

**DEPARTMENT OF STATE REVENUE  
LETTER OF FINDINGS NUMBER: 00-0487  
Gross Income Tax and Penalty  
For the Years 1995-1996**

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**ISSUES**

**I. Gross Income Tax- Out-of-state sales**

**Authority:** 45 IAC 1-1-119; *Indiana Dept. of State Revenue v. Bendix Aviation Corp.*, 143 N.E.2d 91, 237 Ind. 98 (Ind. 1957)

Taxpayer protests the Department's assessment of gross income tax with respect to government sales that were received by the government outside Indiana.

**II. Penalty- Request for waiver**

**Authority:** IC § 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the Department's imposition of the 10% negligence penalty, requesting a waiver for reasonable cause.

**STATEMENT OF FACTS**

Taxpayer, a corporation engaged in the sale of military items, produced items for sale to the federal government. The items were produced in Indiana, with the federal government inspecting and accepting the items in Indiana; however, the items were shipped outside Indiana, and Taxpayer assumed the risk of loss until the items had reached their ultimate destination. Taxpayer was assessed gross income tax and penalty with respect to these sales. Taxpayer has protested the assessment, claiming that the sale occurred in interstate commerce.

**I. Gross Income Tax- Out-of-state sales**

**DISCUSSION**

Taxpayer argues that the Department seeks to impose gross income tax on government sales that were shipped ultimately to out-of-state locations. In particular, a normal contract would work in the following manner: Taxpayer would produce goods in Indiana for sale to the federal

government. The sales were inspected and accepted in Indiana; however, Taxpayer assumed risk of loss until the goods were actually received by the government at out-of-state locations.

Taxpayer maintains that the fact that Taxpayer assumed risk of loss for any goods until the government actually took physical possession of those goods exempted those goods from gross income tax based on 45 IAC 1-1-119 (repealed December 30, 1998), which provides that a sale from an Indiana seller and shipped to an out-of-state buyer is exempt from gross income tax unless the sale in question is completed in Indiana. Taxpayer cites to federal shipping guidelines that provide risk of loss or damage remains with Taxpayer until they are received at the government destination. However, formal title of the goods by terms of the same guidelines passes when the goods are inspected and accepted by the federal government.

On point is the case of *Indiana Dept. of State Revenue v. Bendix Aviation Corp.*, 143 N.E.2d 91, 237 Ind. 98 (Ind. 1957). In that case, a defense contractor sold products manufactured at an Indiana plant to the federal government. The goods were to be shipped via carrier designated by the federal government. The federal government accepted the goods at the South Bend location, even though the goods were to be ultimately shipped to out-of-state locations. The court held that the transactions in question occurred entirely in Indiana. *Id.* at 96, 239 Ind. at 109. Accordingly, the transactions were subject to gross income tax. *Id.* at 99, 239 Ind. at 114.

Here, Taxpayer has acknowledged that the goods were inspected and accepted in Indiana. While the risk of loss remained with Taxpayer, formal transfer of title of the items in question occurred in Indiana, just as the goods in *Bendix Aviation* were accepted by the government in Indiana. Accordingly, the transactions by Taxpayer were completed in Indiana and are subject to Indiana gross income tax.

### **FINDING**

Taxpayer's protest is denied.

## **II. Penalty- Request for waiver**

### **DISCUSSION**

Taxpayer protests the imposition of the 10% negligence penalty on the entire assessment. Taxpayer argues that it had reasonable cause for failing to pay the appropriate amount of tax due.

Indiana Code Section 6-8.1-10-2.1(d) states that if a Taxpayer subject to the negligence penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit taxes held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty. In addition, the relevant Department regulation, 45 IAC 15-11-2, defines negligence as the failure to use reasonable care, caution, or diligence as would be expected of an ordinary reasonable Taxpayer. Negligence results from a Taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the Taxpayer by Indiana's tax statutes and administrative regulations.

In order for the Department to waive the negligence penalty, Taxpayer must prove that its failure to pay the full amount of tax due was due to reasonable cause. Taxpayer may establish reasonable cause by “demonstrat[ing] that it exercised ordinary business care and prudence in carrying or failing to carry out a duty giving rise to the penalty imposed. . . .” In determining whether reasonable cause existed, the Department may consider the nature of the tax involved, previous judicial precedents, previous department instructions, and previous audits.

Taxpayer has provided sufficient information to conclude that the Taxpayer acted with reasonable care, rather than negligently, and accordingly the penalty should be waived.

### **FINDING**

Taxpayer’s protest is sustained.

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